90-1182

NO.

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WARREN E. SAINT THOMAS, Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WARREN E. SAINT THOMAS
P.O. Box 5393
Buena Park, CA 90622
Telephone: (714) 952-0507
Petitioner, pro se

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No.

WARREN E. SAINT THOMAS, Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

QUESTIONS PRESENTED

1. Whether the decision of the Merit Systems Protection Board ("Board") affirming the action of the U.S. Department of the Navy ("Agency") removing petitioner from his position of employment for alleged unsatisfactory performance is illegal and unconstitutional, null and void from its inception, due to failure on the part of the Board to conduct an evidentary hearing on his petition for appeal granted by law and prescribed by Board regulations prior to issuing a decision on the merits of the appeal: an

illegal action which defeated petitioner's constitutionally guaranteed and protected right to a hearing on the matter.

2. If so, did the unlawful action of the Board make moot the decision of the Court of Appeals which affirmed the Board decision; and,

3. Should the decisions below be vacated and the appeal remanded to the Board for the evidentary hearing prescribed by Board regulations cited below.

TABLE OF CONTENTS

	Page
Questions presented for review	1
Table of authorities	J1
Opinions below	3
Jurisdiction of the court	3
Constitutional provisions, statutes, and regulations involved	3
Statement of the case	4-10
Reasons for granting the writ	10-12
Conclusion	12
Appendix	(i)

OPINIONS BELOW

The decision of the Court of Appeals (Federal Circuit) is unreported; it is reproduced in App. A.* Likewise, the decision of the Board is not reported; it is reproduced in App. B.

JURISDICTION

The decision of the court below affirming the decision of the Board was entered on August 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution.	App. C.
5 U.S.C.S. 7701.	App. D.
5 U.S.C.S. 7703.	App. E.
5 C.F.R. 1201.24.	App. F.
5 C.F.R. 1201.41.	App. G.
5 C.F.R. 1201.51.	App. H.
5 C.F.R. 1201.57.	App. I.

*"App. A." refers to an appendice to this petition.

STATEMENT OF THE CASE

1. The nature of the case and proceedings below.

The nature of the case and proceedings below are explained in the Court of Appeals decision, App. A, page A2, under BACKGROUND. Simply stated the Court vacated the Board's earlier decision affirming the agency action removing petitioner from his position of employment, by reason of the fact that the agency failed to prosecute any of the allegations which prompted the agency action, and the Court remanded the appeal to the Board for further proceedings, to: "consider the parties submissions relating to the period prior to (petitioner) receiving notice of unacceptable performance, and . . . determine whether the agency has established by substantial evidence that petitioner committed more than three instances of error in a performance year";
The Board had jurisdiction under 5 U.S.C. 7701 and the Court had jurisdiction under 5 U.S.C. 7703, App. D and E.

2. Right to hearing.

5 U.S.C.S. 7701(a) App. D, page D1, grants petitioner the right to a hearing on his appeal before the Board; this right is restated in Board regulations, 5 C.F.R. 1201.24(d), App. F, page 3. However, under Board regulations a hearing is not automatic: 5 C.F.R. 1201.24(e) prescribe that a "request for hearing must be filed with the petition for appeal" or within such other time periods set by the presiding official.

In compliance with this requirement, petitioner filed a timely request for hearing with his "petition for appeal." The petition for appeal is on file in the "official appellate record" under Tab 1 of Volume 1. On page 1 of the petition, the upper right corner, is the "acknowledgement of receipt" stamp of the Board, dated 14 May 1986; this served as the basis for the hearing held in July 1986.

On page 3 of the petition, under "PART IV. HEARING", the question regarding the request for hearing is answered in the affirmative, to wit:

YOU MAY HAVE A RIGHT TO A HEARING ON THIS APPEAL. IF YOU DO NOT WANT A HEARING, THE BOARD WILL MAKE ITS DECISION ON THE BASIS OF THE DOCUMENTS YOU AND THE AGENCY SUBMIT. IF NO SQUARE IS CHECKED, THE BOARD WILL PRESUME YOU ARE WAIVING A HEARING. DO YOU WANT A HEARING?

| X | YES | | NO

IF YOU CHOOSE A HEARING THE BOARD WILL NOTIFY YOU WHEN AND WHERE IT IS TO BE HELD.

3. Procedure for hearing.

Board regulations, 5 C.F.R. 1201.41(b)(5), App. G, page G1, directed the presiding official to "schedule a hearing, after advance notice to the parties"; 5 C.F.R. 1201.51(a), App. H, page H1, prescribe that the "notice of hearing" be issued fixing the date, time, and place of the hearing; and 5 C.F.R. 1201.57(a), App. I, page I1, establishes the order of the hearing.

4. Failure to conduct hearing.

The Board further remanded the appeal to its regional office in San Francisco for compliance with the Court's directive. However, at no time prior to issuing the decision affirming the agency action did the presiding official (Administrative Judge) schedule the hearing prescribed by 5 C.F.R. 1201.41(b)(5), nor did he issue a notice of hearing required by 5 C.F.R. 1201.51(a); nor did he ask petitioner to verify or update his request for hearing filed with the petition for appeal; these facts are verified by the absence of any such documents in the appellate file as reflected by the "certified list".

Nor, in spite of petitioner's request for hearing filed with the petition for appeal, did the administrative judge conduct the evidentary hearing prescribed by 5 C.F.R. 1201.57(a), and nowhere in the decision does he cite any legal authority or otherwise explain why he did not conduct the hearing.

5. Nullification of the decision.

In the sixth paragraph of the Board's decision (App. B, page B6, second paragraph), the administrative judge explains the scope of the Board's inquiry on remand, as follows:

"The Court stated that the Board should "consider the parties' submissions" relating to the time period before the appellant received the notice of unacceptable performance. This did not limit the Board to reviewing the assembled record, and did not preclude the taking of evidence."

We agree, the administrative judge was required to review the assembled record in order to determine whether new evidence provided by the agency should be considered. If so, then, it was incumbent upon him to schedule a hearing so that petitioner could exercise his legal and constitutional right to be heard on the matter, in the manner prescribed by law, the rules of evidence, and applicable[1] Board regulations.

---

[1]App. I, p. I1.

According to the statement appearing in the Board decision, page B6, the second paragraph, the administrative judge explains that he arrived at the decision solely on the basis of documents "mailed in" by the agency, as though petitioner did not invoke his right to hearing in his petition for appeal; to wit:
The agency provided affidavit and documentary evidence which established by substantial evidence four of the enumerated incidents of error.

The submissions by the agency referred to above pertain to the very same allegations the agency failed to prosecute at the hearing held in July 1986. Consequently, the failure of the administrative judge to conduct the hearing prescribed by Board regulations deprived petitioner of his legal and constitutional right[2,3] to due process of law, thereby nullifying the Board decision.

---

[2]App. C, page C1.
[3]App. K, page K1.

A copy of the petition for appeal was not submitted to the Court of Appeals because it was not available prior to the Court's decision. However, the issue of due process, failure to conduct hearing, was raised in petitioner's brief to the Court, but based on incorrect information submitted to the Court in respondent's brief to the effect that "petitioner failed to request a hearing", caused the Court to erroneously conclude: "Petitioner had an opportunity to be heard as to the receipt of these submissions, but failed to request a hearing on this matter." (App. A, page A6, second paragraph.)

REASONS FOR GRANTING WRIT

The Board decision below is illegal and unconstitutional, null and void from its inception, by reason of the fact that the decision was obtained without procedures required by law and regulations having been followed, in violation of petitioner's right to hearing granted by law and guaranteed by the Bill of Rights.

If so, then, it follows that the unlawful Board action made moot the decision of the Court of Appeals which affirmed the Board decision.

The record shows that petitioner filed a timely request for hearing with his petition for appeal in accordance with Board regulations governing appellate procedures, but the administrative judge assigned to the case failed to comply with the directives mandating the evidentary hearing prescribed, making it impossible for petitioner to defend himself.

The questions presented are of widespread importance to all appellants appearing before the Board who cannot afford the high cost of professional legal counsel and must appear pro se; and for the enforcement of individual rights granted by law and protected by the constitution - especially when such right is specifically, clearly and timely invoked.

[4] In the interest of justice, petitioner hereby requests the Court to vacate the decisions below and remand the appeal to the Board for the evidentary hearing mandated by law, rule, and regulation cited above.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

16 Jan 91
(Date)

WARREN E. SAINT THOMAS
P.O. Box 5393
Buena Park, CA 90622
Telephone: (714) 952-0507
Petition, pro se

[4] App. J., page J2 at (C)

PAGE

A	Court of Appeals Decision..	A1,7
B	Board Decision.....	B1,11
C	Constitutional Provision...	C1
D	5 U.S.C.S. 7701.....	D1,11
E	5 U.S.C.S. 7703.....	E1,4
F	5 C.F.R. 1201.24.....	F1,3
G	5 C.F.R. 1201.41.....	G1,4
H	5 C.F.R. 1201.51.....	H1,2
I	5 C.F.R. 1201.57.....	I1
J	Table of Authorities.....	J1,2

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE

FEDERAL CIRCUIT

90-3199

WARREN E. SAINT THOMAS,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

Decided: August 16, 1990

Before MICHEL, Circuit Judge, BALDWIN, Senior Circuit Judge, and LOURIE, Circuit Judge.

PER CURIAM.

DECISION

This case is an appeal from the January 8, 1990, Decision of the Merit Systems Protection Board ("Board"), Docket No. SF04328610540-1, which became final on February 12, 1990, sustaining the decision of the Department of the Navy ("Agency") to remove petitioner from his position of management analyst on the ground of unsatisfactory performance. Since petitioner has not shown that the Board's decision was procedurally defective, unsupported by substantial evidence, arbitrary or capricious, we affirm.

BACKGROUND

On August 9, 1989, this court vacated the Board's earlier decision affirming the Agency's decision to remove him, and it remanded the case to the Board for further proceedings. Warren E. Saint Thomas v. Department of the Navy, No. 89-3260, slip op at 3 (Fed. Cir. Aug 9, 1989). On September 11th, the Board remanded the case to an administrative judge directing

the parties to file "within 30 days . . . copies of any briefs or other filings relating to the merits of the appeal to Federal Circuit which have not been provided to the Board." The Administrative Judge ordered on September 25th that the parties "identify and (sic) submissions relating to the performance period PRIOR to the time the (petitioner) received notice of unacceptable performance."

Petitioner responded to this order on October 2nd, identifying his submissions relating to the performance period prior to the time petitioner received the notice of unacceptable performance. The Agency responded to this order on November 29th by submitting a declaration by petitioner's former supervisor for the Agency which noted the occurrence of four errors by petitioner during the period of July 1985 to January 1986.

Petitioner responded to this submission by arguing that the Agency's response and submissions should not be accepted because they were submitted forty-nine days after the expiration of the Board's thirty-day time limit, and the

rules of evidence and petitioner's due process rights forbid the consideration of the new submissions. The Board found that no time limits had been placed on submitting further evidence. Also, using the above-mentioned submissions, the Board found that the Agency established by substantial evidence four incidents of error and affirmed the Agency decision to remove petitioner; this decision became final on February 12, 1990. Petitioner then appealed to this court on the grounds that the Board went outside the record, its decision was procedurally defective for lack of due process, there is no merit to the allegations charged, and the removal action was arbitrary or capricious.

DISCUSSION

We review the Board's decision to determine if it was arbitrary, capricious, an abuse of discretion, not in accordance with law, procedurally defective or unsupported by substantial evidence. 5 U.S.C. 7703(c) (1988). This court vacated and remanded the first Board decision and

ordered the Board to consider the parties' submissions relating to the period prior to (petitioner) receiving notice of unacceptable performance, and . . determine whether the agency has established by substantial evidence that the (petitioner) committed more than three instances of error in a performance year."

We note first that the order by the Administrative Judge for the parties to identify submissions relating to the performance period prior to the time petitioner received notice of unacceptable performance did not have any time limit. The Agency thus did not file its relevant submissions late.

The Board stated, in its final decision, that since the Administrative Judge had previously precluded the parties from addressing the subject of the petitioner's performance prior to the forty-five day period of the reasonable opportunity to perform, and this court remanded the case for further evidence, the court's order cannot be construed to preclude the taking of evidence by the Board. This court, in its earlier opinion, referred to the fact that errors

were alleged for which the Agency offered no proof. Its remand was for the purpose of permitting the Board to consider the parties' submissions as to whether the agency has established by substantial evidence that petitioner committed more than three instances of error in a performance year. Had the court intended the case to be decided using only the record that existed at the time it remanded the case, it would have decided the case then instead of remanding it to the Board.

Moreover, 5 C.F.R. 1201.41(3) provides that Board judges' powers include authority to rule on offers of proof and receive relevant evidence. The Board thus has broad discretion in receiving evidence; we do not think it was error for it to receive the relevant submissions or that it violated petitioner's due process rights in so doing. Petitioner had an opportunity to be heard as to the receipt of these submissions, but failed to request a hearing on this matter.

The documentary evidence submitted by the Agency has not been disputed by petitioner; we conclude that these

documents constitute substantial evidence to support the Board's decision. We also conclude that petitioner has not shown the Board's decision to be arbitrary or capricious.

AFFIRMED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

WARREN E. SAINT THOMAS, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NO. SF04328610540-1 Date: January 8, 1990

Warren E. Saint Thomas, Buena Park, California, pro se.

Patricia L. Miles, Alameda, California, for the Agency.

BEFORE

Philip L. Arnaudo
Administrative Judge

INITIAL DECISION

INTRODUCTION

This appeal was remanded to the San Francisco Regional Office by the Board pursuant to an order of the United States Court of Appeals for the Federal Circuit. Board jurisdiction over this matter is based upon 5 U.S.C. § 7703(c) and 5 U.S.C. § 4303(e). For the reasons set forth below the agency decision to remove the appellant is AFFIRMED.

ANALYSIS AND FINDINGS

Background and Prior Appellate History

Effective May 9, 1986, the appellant was removed from the position of Management Analyst for failure to meet two Critical elements (i.e., 1 and 4) of his performance standards. A Board initial decision issued August 15, 1986, found that the agency had established the requisite elements for taking the removal action under 5 U.S.C. Part 432. Specifically, the agency established by substantial evidence that the appellant's performance of Critical Element #1 was

unsatisfactory.[1] The initial decision affirmed the agency removal action. On April 28, 1989, the Board denied the appellant's petition for review.

The United States Court of Appeals for the Federal Circuit issued a decision on August 9, 1989, which remanded the case to the Board for further proceedings. *Saint Thomas v. Department of the Navy*, No. 89-3260, slip op. at 3 (Fed. Cir. Aug. 9, 1989). The Court reviewed critical element #1. It noted that the evidence supported the Administrative Judge's finding that one instance of error had been established during the reasonable opportunity to perform period, and that this supported a conclusion that the appellant's performance remained unsatisfactory. The Court also determined, however, that the performance standard required the agency to establish more than three instances of error in a

[1]The Administrative Judge did not address any portion of the agency case on the second critical element, #4, in accordance with *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 628 (1984).

performance year prior to the improvement period. Accordingly, the Court concluded, "Therefore, to sustain its burden of proof, the agency would have had to prove three or more errors during or prior to the improvement period." *Id.* at 3.

The Court order directed the Board as follows: "... the proceeding (is) remanded to the Board so that it may consider the parties submissions relating to the period prior to (appellant's) receiving the notice of unacceptable performance, and may determine whether the agency has established by substantial evidence that the appellant committed more than three instances of error in a performance year." *Id.* at 3.

Required determination regarding year prior to Notice of Unacceptable Performance

As explained below, I find that the agency has established by substantial evidence that the appellant committed more than three instances of error in a performance year.

The agency issued the appellant a notice of unacceptable performance dated

January 30, 1986. This notice set forth in detail six separate instances of performance error during the performance year prior to the notice.[2] The notice also advised the appellant of his 45 day opportunity-to-improve period.

The agency provided affidavit and documentary evidence which established by substantial evidence four of the enumerated incidents of error. The affidavit was provided by the Deputy Position Management Officer who selected the appellant for his position and who supervised him at the time of the removal. She stated that during the relevant performance year, she documented more than three instances of erroneous work.

The documentary evidence supported this assertion. This evidence included both the erroneous and corrected work attributed to the appellant, and contemporaneously prepared memoranda identifying and discussing the errors.

The appellant does not dispute the evidence. He contends, however, that it

---

[2]The first occurred on July 24, 1985 and the most recent in the second week of January 1986. (See notice paragraph 2e).

should not be considered because the Board did not direct the taking of evidence on this matter. Further, the appellant asserts that the agency submission was late and should be rejected on that basis. Both contentions are unsupported by the evidence.

The Court order remanding the matter to the Board establishes the scope of the Board's inquiry. The Court stated that the Board should "consider the parties' submissions" relating to the time period before the appellant received the notice of unacceptable performance. This did not limit the Board to reviewing the assembled record, and did not preclude the taking of evidence. In short, no specific limitation was set by the Court on "the parties' submissions" to be reviewed.

Further, no such limitation would be reasonable in light of the applicable case law and the history of the case. Consistent with the decision of the Court in *Adkins v. Department of Housing and Urban Development*, 781 F.2d. 891, 896 (Fed. Cir. 1986), the Administrative Judge precluded the parties from addressing the subject of the appellant's performance

prior to the 45-day period of the reasonable opportunity to perform. The Court specifically took note that *Adkins* supported the proposition that there was no requirement that an agency establish that an employee was performing unsatisfactorily prior to receiving notice of unacceptable performance. Indeed, it was because this was not addressed that no evidence was taken on the matter. Therefore, as the Court would be aware, the record would be devoid of such evidence, unless, by chance, the Administrative Judge had allowed it into the record although she had previously concluded that it was immaterial or irrelevant to the only issue, i.e., the appellant's performance during the 45-day period.

Thus, by a plain reading and/or reasonable interpretation of the Court order, I find that the parties were not

precluded from further submissions.[3] Moreover, by order dated September 25, 1989, the Administrative Judge advised the parties to comply with the Court's order and to identify submissions relating to the relevant time period. The parties were also reminded to comply with the Board's September 12, 1989 remand order concerning any separate submissions to the Court which had not been entered into the Board's appellate record.

In summary, I find that the agency has established by substantial evidence that the appellant made three or more errors during or prior to the improvement period. The Court sustained the finding in the initial decision that the appellant's "performance remained unsatisfactory after being given a reasonable opportunity to improve." Therefore, I find that the agency has

[3]The Board's September 12, 1989 remand order directed the parties to review the appellate record of their submissions to the Court and to provide the Board any documents that they had sent to the Court but not the Board. The Board gave the parties 30 days to provide this documentation. Consistent with the Court's order, however, the Board did not place any limits on, or preclude, further submissions.

established by substantial evidence that the appellant's performance in Critical Element #1 of his standards was unsatisfactory for the relevant period of time.[4]

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

_____
Philip L. Arnaudo
Administrative Judge

NOTICE TO APPELLANT

This intial decision will become final on February 12, 1990, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a

[4]There is no basis to address the portion of the initial agency decision which concluded that he had also failed to meet Critical Element #4 of his performance standards.

petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW, Suite 802
Washington DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you

fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

ARTICLE (V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

5 U.S.C. 7701 (1989). Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right --

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) (1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3109 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case

may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2) (A) If any employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless --

(i) the deciding official determines that the granting of such relief is not appropriate, or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the

place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require

any award or back pay or attorney fees to be paid before the decision is final.

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision --

(A) in the case of an action based on unacceptable performance described in section 4303 of this title (5 USCS 4303), is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment -

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section

2302(b) of this title (5 USCS 2302(b); or

(C) shows that the decision was not in accordance with law.

(d) (1) In any case in which --

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title (5 USCS 101 et seq) shall be construed to

permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e) (1) Except as provided in section 7702 of this title (5 USCS 7702), any decision under subsection (b) of this section shall be final unless --

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall

not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative judge or other employee of the Board designated to hear a case may --

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals being processed expeditiously and would not adversely affect any party.

(g) (1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to

hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.'

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title (5 USCS 2302(b)(1)), the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k) (42 USCS 200e-5(k).

(h) The Board may, by regulation, provide for one or more alternative methods for

settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i) (1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days,

the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) The Board may prescribe regulations to carry out the purpose of this section. (Sept. 6, 1966, P.L. 89-554, 1, 80 Stat. 530; Oct. 13, 1978, P.L. 95-454, Title II, 205, Stat. 1138; Aug. 14, 1979, P.L. 96-54, 2(a)(45), 93 Stat. 384; Aug. 22, 1986, P.L. 99-386, Title II, 208, 100 Stat. 824.)

5 U.S.C.S. 7703 (1989). Judicial review of decisions of the Merit Systems Protection Board.

(a) (1) Any employee or employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition

for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title (5 USCS 7702) shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b) (42 USCS 2000e-16(c), 29 USCS 633a(c), 216(b)), as applicable. Nothwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702 (5 USCS 7702).

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be-

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule regulation, or policy directive. If the Director did not intervene in a matter before the Board,

the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition in the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(Added Oct. 13, 1978, P.L. 95-454, Title II, 205, 92 Stat. 1143; Apr. 2, 1982, P.L. 97-164, Title I, Part B, 144, 96 Stat. 45.)

5 C.F.R. Part 1201 (1986)

5 C.F.R. 1201.24. Content of petition for appeal, right to hearing.

(a) Content. A petition for appeal must be filed by the appellant, his/her designated representative, or a party properly substituted under 1201.35. Petitions may be in any format, including letter form, but must contain the following:

(1) The name, address, and telephone number of the appellant, and the name and address of the acting agency;

(2) The action taken by the agency and its effective date;

(3) A request for hearing if desired;

(4) A statement of the reasons why the appellant believes that the agency action was wrong;

(5) A statement of the action the appellant would like the presiding official to order;

(6) The name, address, and telephone number of the appellant's representative, if any;

(7) Attachment of any relevant documents including the decision notice;

(8) A statement that the appellant or anyone acting on his/her behalf has or has not filed a grievance or complaint with any agency regarding this matter;

(9) Signature of the appellant and the representative, if any; and

(10) A request, if the appellant desires, to have the matter processed under the voluntary expedited appeals procedure set forth at 1201.200 through 1201.222.

(b) Failure to state a claim or defense in the petition shall not bar its submission later unless it is shown that the late submission would prejudice the rights of the other parties or substantially delay the proceedings.

(c) Use of form. Completion of the form in Appendix I of this part. If appropriate, shall constitute compliance with paragraph (a) of this section and 1201.31 if a representative is designated in the form. Appendix I of this part contains an entry for the election of the expeditious procedure and an explanation thereof.

(d) Right to hearing. Under 5 U.S.C. 7701, an appellant has a right to a hearing. If the parties choose to utilize the voluntary expedited appeals procedure, the procedure for a hearing shall be in accordance with 1201.206.

(e) Timely request. A request for a hearing shall be filed with the petition for appeal, or within such other time periods as set by the presiding official. Failure to make a timely request will be deemed to constitute a waiver of the right to a hearing. If a hearing is not requested, or if the appellant fails to appear for a scheduled hearing without good cause, the appeal may be adjudicated on the record.

5 C.F.R. 1201. Part 1201 (1986)

5 C.F.R. 1201. 41. Presiding officials.

(a) Exercise of authority. Presiding officials may exercise authority as provided in paragraphs (b) and (c) of this section upon their own motion or upon motion of a party, as appropriate.

(b) Authority. Presiding officials shall conduct fair and impartial hearings and take all necessary action to avoid delay in the disposition of all proceedings. They shall have all powers necessary to that end unless otherwise limited by law, including but not limited to the authority to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas in accordance with 1201.81;

(3) Rule upon offers of proof and receive relevant evidence;

(4) Rule upon the institution of discovery procedures as appropriate under 1201.73;

(5) After advance notice to the parties, order a hearing on his/her own

initiative or at the request of the agency, if the presiding official determines that a hearing is necessary;

(i) To resolve an important issue of credibility;

(ii) To insure that the record is fully developed on significant issues; or

(iii) To otherwise ensure fair and just adjudication of the case.

(6) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum and exclude from the hearing any disruptive persons;

(7) Exclude from the hearing any witnesses whose later testimony might be colored by testimony of other witnesses or any person whose presence might have a chilling effect on the testifying witness;

(8) Rule on all motions, witnesses and exhibit lists and proposed findings;

(9) Require the filing of memoranda of law and the presentation of oral argument with respect to any question of law;

(10) Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material and nonrepetitious;

(11) Impose sanctions as provided under 1201.43 of this part;

(12) Hold a prehearing conference for the settlement and simplification of issues; and

(13) Issue initial decisions.

(c) Settlement. -(1) Settlement discussion. Informal settlement of the dispute may be raised by the presiding official with the parties at any time. The parties may agree to waive the prohibitions against ex parte communications during settlement discussions, including agreement for any limitations upon waiver.

(2) Agreement. -If the parties agree to a settlement without a decision on the merits of the case, the settlement agreement will be the final and binding resolution of the appeal, and the presiding official will dismiss the appeal with prejudice.

(i) If the agreement is offered into the record by the parties and approved by the presiding official, it will be made a part of the record, and the Board will retain jurisdiction to insure compliance with the agreement.

(ii) If the agreement is not entered into the record, the Board will not retain jurisdiction to insure compliance.

5 C.F.R. 1201. Part 1201 (1986)

5 C.F.R. 1201.51. Scheduling the hearing.

(a) The notice of hearing shall fix the date, time, and place of the hearing. The hearing shall be scheduled not earlier than 15 days after the date of the notice unless the parties agree to an earlier date. The agency, upon request of the presiding official, shall provide appropriate hearing space.

(b) The presiding official may change the time, date, or place of hearing, or suspend, adjourn, or continue the hearing. Any such change shall not require the 15-day notice provided in paragraph (a) of this section. Motions for postponement by either party shall be made in writing and accompanied by an affidavit setting forth the reasons for the request and shall be granted only upon a showing of good cause.

(c) The Board has established certain approved hearing locations, which are published as a Notice in the Federal Register. (see Appendix III). Parties may file motions, for good cause, to

request a different hearing location. Rulings on such motions will be based on a showing that a different location will be more advantageous to all parties and the Board.

5 C.F.R. 1201. Part 1201 (1986)

5 C.F.R. 1201.57. Order of hearing.

(a) In cases where an action has been taken againt an employee by the agency, the agency shall present its case first. The appellant may then present evidence.

(b) The appellant shall proceed first at hearings convened on the issues of:

(1) Jurisdiction;

(2) Timeliness; or

(3) OPM disallowance of an application for retirement benefits, when the application was filed by the appellant, then the agency may present its evidence.

(c) The presiding official may vary the normal order of moving forward when deemed appropriate in the circumstances of a specific case.

TABLE OF AUTHORITIES

DUE PROCESS OF LAW

(A) Phrase means that no person shall be deprived of life, liberty, property or of any right granted him by statute, unless matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings, and it forbids condemnation without a hearing. Pettit v. Penn, La.App., 180 So.2d 66,69.

(B) Fundamental requisite of "due process" is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiese or contest, and to assert before the appropriate decision-making body the reasons for such choice. Trinity Episcopal Corp. v. Romney, D.C.N.Y.., 387 F.Supp. 1044,1084.